LIBRARY
SUPREME COURT, U. S.

No. 75-1090

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

Supreme Court, U. S.
FILED
FEB 2 1976
MICHAEL RODAK, JR., CLERK

KEITH B. REDD, d/b/a ABAJO PETROLEUM,
Petitioner,

vs.

SHELL OIL COMPANY and
CONTINENTAL OIL COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DANIEL. L BERMAN
DOUGLAS J. PARRY
Attorneys for Petitioner

Berman & Giauque
500 Kearns Building
Salt Lake City, Utah 84101

INDEX

Page

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTES INVOLVED 5

STATEMENT OF THE CASE 5

A. Proceedings in the Trial Court 5

B. Statement of Facts on Territorial Resale Restriction Claim 7

C. Statement of Uncontroverted Facts Supporting Redd's Claim of Illegal Tying 11

D. Opinions Below 15

REASONS FOR GRANTING THE WRIT 16

A. The Circuit Court's Decision Squarely Conflicts with this Court's Decision in *U.S. v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) 16

B. The Tenth Circuit's "Firm and Resolute" Limitation on *Schwinn* Conflicts with the Decisions of the Ninth and Fifth Circuits 19

C. The Decision of the Tenth Circuit Conflicts with the Decisions of Every Other Circuit that has Passed on the Question of Whether a Trademark License is a "Separate" item for Tying Purposes 20

D. The Question of Whether Major Oil Companies Can Use Trademark Licenses to Control the Supply of Gasoline and Other Refined Petroleum Products to Their Branded Jobbers and Dealers Conflicts with the Rationale of this Court's Decision in *Timken Roller Bearing Co. v. U.S.*, 341 U.S. 593 (1951) and is of Substantial Importance to the Petroleum Industry and to the Nation 27

CONCLUSION 30

CERTIFICATE OF SERVICE 31

TABLE OF CASES

Page

Colorado Pump & Supply Co. v. Febco, Inc., 472 F.2d 637 (10th Cir.), *cert. denied*, 411 U.S. 987 (1973) 18

Copper Liquor, Inc. v. The Adolf Coors Co., 506 F.2d 934 (5th Cir. 1975) 19

Detroit City Dairy, Inc. v. Kowalski Sausage Co., Inc., 393 F. Supp. 453 (E. D. Mich. 1975) 21

Falls Church Bratwursthaus, Inc. v. Bratwursthaus Mgmt. Corp., 354 F. Supp. 1237 (E. D. Va. 1973) 22

Federal Trade Comm'n v. Texaco, Inc., 393 U.S. 223 (1968) 18

Federal Trade Comm'n v. Phillips Petroleum Co., 3 Trade Reg. Rep. ¶ 20,716 (Dec. 27, 1974) (FTC cease and desist order) 22

Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969) 20, 21

Hawkins v. Holiday Inns, Inc., 1975 Trade Cas. ¶ 60,153 (W. D. Tenn. 1975) 22

International Business Machines Corp. v. United States, 298 U.S. 131 (1936) 21

International Salt Co., Inc. v. United States, 332 U.S. 392 (1947) 20, 25

Kugler v. AAMCO Automatic Transmissions, Inc., 337 F. Supp. 872 (D. Minn. 1971), *aff'd*, 460 F.2d 1214 (8th Cir. 1972) 25

MacMahan Pharmacal Co. v. Denver Chemical Manufacturing Co., 113 Fed. 468 (8th Cir. 1901) 22

Noble v. McClatchy Newspapers, — F.2d — 1975-2 Trade Cas. ¶ 60,594 (9th Cir. Nov. 14, 1975) 19

Northern Pacific Ry. Co. v. United States, 356 U.S. 1 (1958) 20

Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) 4, 21, 22, 23, 24, 25, 27

TABLE OF CASES — (Continued)

Page

Standard Oil Co. v. United States, 337 U.S. 293 (1949) 20, 27

Susser v. Carvel Corp., 332 F.2d 505 (2d. Cir. 1964), *cert. dismissed*, 381 U.S. 125 (1965) 4, 21

Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) 22, 27

Timken Roller Bearing Co. v. United States, 83 F. Supp. 284 (N.D. Ohio 1949) 27, 28

Ungar v. Dunkin' Donuts of America, Inc., 1975 Trade Cas. ¶ 60,204 (E.D. Pa. 1975) 21

United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) 3, 16, 17, 18, 19, 20

United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961) 25, 27

United States v. Topco Assoc., Inc., 405 U.S. 596 (1972) 17, 20

Warriner Hermetics, Inc. v. Copeland Refrigeration Corp., 463 F.2d 1002 (5th Cir.), *cert. denied*, 409 U.S. 1086 (1972) 4, 21, 22

White Motor Co. v. United States, 372 U.S. 253 (1963) 20

STATUTES

Lanham Act, 15 U.S.C. § 1115(b)(7) 5

Sherman Act, 15 U.S.C. § 1 ..... 1, 2, 3, 4, 5

SECONDARY AUTHORITY

FTC, STAFF REPORT ON LEGAL PROBLEMS IN CONNECTION WITH FRANCHISE AGREEMENTS (1969) 22

FTC, STAFF REPORT ON THE PETROLEUM INDUSTRY (1973) 28

McCarthy, *Trademarks Franchising and Antitrust, The Trouble with Tie-ins*, 50 Calif. L. Rev. 1085 (1970) 22

No.....

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

KEITH B. REDD, d/b/a ABAJO PETROLEUM,
Petitioner,

vs.

SHELL OIL COMPANY and
CONTINENTAL OIL COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INTRODUCTION

Petitioner Keith B. Redd prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Tenth Circuit entered on November 3, 1975, reversing a district court judgment in favor of Mr. Redd in a private antitrust action and squarely holding: (1) An explicit agreement between a manufacturer and each of its jobbers to restrict the territory in which each jobber can resell products purchased from the manufacturer is not a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, unless there is "firm and resolute" enforcement of the restriction by the manufacturer, and (2) No tying agreement subject to Section 1 of the Sherman Act, 15 U.S.C. § 1, arises when a major oil company grants all of its branded jobbers a franchise to use the company's marketing identification, including its trademarks, on the explicit condition that the total

supply of refined petroleum products marketed by such jobbers under such identification be purchased from the company on the ground the right to use the company's marketing identification is "inseparable" as a matter of law for tying purposes from the supply of refined petroleum products even though the company sells the very same refined petroleum products separately from its marketing identification and even though the company acquires refined petroleum products that it markets from other major oil companies by specification.

OPINIONS BELOW

The opinion of the Tenth Circuit at this time has only been reported in *Redd v. Shell Oil Company,* 1975-2 CCH Trade Cas. ¶ 60,572 (10th Cir. Nov. 3, 1975) and is printed in Appendix A to this petition (A-1—A-7). The opinion of the United States District Court for the District of Utah in the action below is only reported in *Redd. v. Shell Oil Company,* 1974-2 CCH Trade Cas., ¶ 75,390 (D. Utah 1974) and is also printed in Appendix A. (A-8—A-27)

JURISDICTION

The judgment of the Tenth Circuit was entered on November 3, 1975, and the jurisdiction of this Court to review that judgment by writ of certiorari is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an explicit agreement between a major oil company and a branded jobber to restrict the territory in which the jobber can resell refined petroleum products purchased from the oil company constitutes a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C.

§ 1, only if the major oil company takes "firm and resolute" action to enforce the restriction.

2. Whether the holding of the Tenth Circuit that an explicit agreement between a manufacturer and its customer to restrict the territory in which the customer can resell products purchased from the manufacturer only constitutes a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, if the manufacturer takes "firm and resolute" action to enforce the restriction is contrary to this Court's decision in *U.S. v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

3. Whether Shell entered into an unlawful tying arrangement with its branded Shell jobbers as a matter of law when (a) the franchise provisions of all of its Shell jobber contracts granting such jobbers a franchise to use Shell's marketing identification — its trademarks, brand names, and color scheme — required such jobbers to purchase the total supply of refined petroleum products, including gasoline, marketed by them under such identification from Shell, (b) very substantial quantities of gasoline were sold by Shell to such jobbers pursuant to such contracts, (c) Shell acquired gasoline that it compelled its jobbers to purchase from Shell pursuant to such franchise provision from non-Shell sources by specification, and (d) Shell marketed the identical products, including gasoline, in extensive quantities separately from the Shell identification.

4. Whether no tying arrangement subject to the scrutiny of Section 1 of the Sherman Act, 15 U.S.C. § 1, arises when a major oil company grants all of its branded jobbers a franchise to use the company's marketing identification, including its trademarks, on the explicit condition that the total supply of refined petroleum products

marketed by such jobbers under such identification be purchased from the company on the ground the right to use the company's marketing identification is "inseparable" as a matter of law for tying purposes from the supply of refined petroleum products even though the company sells the very same refined petroleum products separately from its marketing identification and even though the company acquires refined petroleum products that it requires its branded jobbers to buy from it from other major oil companies by specification.

5. Whether the Tenth Circuit's decision below or the decisions of the Ninth Circuit in *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), the Fifth Circuit in *Warriner Hermetics, Inc. v. Copeland Refrigeration Corp.*, 463 F.2d 1002 (5th Cir), *cert. denied*, 409 U.S. 1086 (1972), and the Second Circuit in *Susser v. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), *cert. dism'd*, 381 U.S. 125 (1965), should control the determination of whether a trademark license is a separate item for tying purposes under Section 1 of the Sherman Act, 15 U.S.C. § 1.

6. Whether a trademark license in the form of a marketing franchise grants the owner of the mark a monopoly to control the supply of products marketed under the franchise.

7. Whether the branded jobbers of a major oil company under Section 1 of the Sherman Act, 15 U.S.C. § 1, are entitled to the same competitive opportunity with regard to the purchase of gasoline for resale under the company's marketing identification as the major oil company — that is the opportunity to purchase by specification.

8. Whether Shell's counterclaim of trademark infringement to enforce its tying arrangement with its branded jobbers was barred as a matter of law by Shell's misuse of its trademarks in connection with violations of the antitrust laws of the United States, 15 U.S.C. § 1115(b)(7).

STATUTES INVOLVED

The statutes involved are Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 33(b)(7) of the Lanham Act, 15 U.S.C. § 1115(b)(7), and these statutes are printed in Appendix B to this Petition.

STATEMENT OF THE CASE

A. Proceedings in the Trial Court. Mr. Redd, doing business as Abajo Petroleum, commenced this private antitrust action in the United States District Court for the District of Utah and invoked the jurisdiction of that court with regard to the antitrust claims asserted pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26. Mr. Redd asserted three claims against Shell: (1) an illegal tying claim under Section 1 of the Sherman Act, (2) a territorial resale restriction claim under the same section, and (3) a claim for breach of contract. Shell counterclaimed against Abajo for trademark infringement. Mr. Redd pled an affirmative defense of trademark misuse to Shell's counterclaim.

The district court granted the Plaintiff's motion for partial summary judgment on its claim of illegal tying and determined as a matter of law that Shell had entered into an illegal tying arrangement in violation of Section 1 of the Sherman Act. The district court also granted Abajo's motion for summary judgment on Shell's coun-

terclaim on the ground Shell had misused its trademarks in connection with violations of the antitrust laws of the United States by (1) its illegal tying arrangement, and by (2) the explicit territorial resale restriction of the franchise provision of Shell's jobber sales contract with Redd. (A-8—A-27)

All issues raised by Redd's claims other than the liability issue on his claim of illegal tying were submitted to a jury for determination. The jury, of course, was not instructed in any way of the summary judgment on Shell's counterclaim or the Court's grounds for the granting of that motion. The Plaintiff did not request the trial court for a determination of its affirmative claim of territorial resale restriction as a matter of law either by motion for a directed verdict or a request for a preemptory instruction, and Shell did not claim in any way in its exceptions to the Court's charge that the Court had taken the issue of liability on the Plaintiff's claim of territorial resale restriction from the jury. (R. 1855-58)[1] The Court did refuse to give Shell's request that an explicit territorial resale restriction between Shell and its branded jobbers was not a *per se* violation of Section 1 of the Sherman Act absent "firm and resolute" enforcement of the restriction by Shell.

The jury returned a verdict in favor of Redd and answered Rule 49(b) interrogatories separately with regard to each of Redd's claims. (R. 375-77; R. 1863-65) The jury's answers to such separate interrogatories were not only consistent with its general verdict, but such answers

---

[1]Cites in this Petition are to the pages in the Joint Appendix filed in the Circuit Court (designated as R....). Plaintiff's and Defendants' Exhibits are cited to as "PX" and "DX" respectively by the numbers or letter designation of the Exhibit and to the page in the Exhibits Volume where the referenced material appears as "Ex." Cites to the Appendix to this Petition are to the Appendix A, B or C and then appropriate Appendix page.

segregated Redd's claims of illegal tying and territorial resale restriction for the purpose of appellate review. Upon the trebling of the amounts awarded by the jury on Redd's antitrust claims and the award of attorney's fees, the trial court entered a judgment for Redd in the amount of $423,662.63.

B. Statement of Facts on territorial resale restriction claim. Keith Redd served as a Shell jobber from April 1964, until he was terminated by Shell on March 31, 1971. (PX. 2, Ex. 14, R. 438; PX. 11, Ex. 44, R. 548) During the entire time Redd was a Shell jobber the Shell jobber sales contract he signed on April 8, 1964, covered his basic business relationship with Shell. The provision of that contract denominated "FRANCHISE" granted Redd a franchise to market refined petroleum products purchased from Shell under Shell's marketing identification — its trademarks, brand name and color scheme — within a territory assigned to him under the franchise provision. The franchise provision prohibited Redd from marketing any of the products he purchased from Shell outside of his assigned territory in this language:

> FRANCHISE: . . . Buyer shall not sell . . . any product purchased hereunder outside of, or for delivery or resale outside of, Buyer's territory (Shell's decision to be final as to whether or not any location is within Buyer's territory). (PX. 2, Ex. 2, R. 438; PX. 14, Ex. 33, R. 782)

"Buyer's territory" was defined in the contract as the territory "outlined in red on the map attached hereto" (*Ibid.*, and see, Appendix C) and as the Tenth Circuit acknowledged, a map was attached to Redd's contract and the agreement contained "clear restrictions on the area within which Plaintiff could sell". (A-5) The restrictive covenant was enforced by the termination provision of the contract. (PX. 14, Ex. 35, ¶H, R. 782)

Redd's jobber sales contract with its explicit territorial resale restriction was a standard form Shell jobber contract and was used by Shell for each of Shell's 40 jobbers in Shell's Phoenix District, the Shell marketing district in which Redd's territory was located. (R. 80-83; PX. 18, Ex. 84-86, R. 813)

Redd's business was headquartered at Blanding, Utah, and Shell at all times supplied Redd with gasoline and diesel fuel refined by Shell at Shell's refinery in Ciniza, New Mexico. (R. 451-52, 470) The location of Shell's Ciniza refinery in relationship to Redd's assigned territory is set forth in Appendix C to this petition.

Within his assigned territory Redd marketed the products he purchased from Shell at retail gasoline stations in Monticello and Blanding, Utah, and Many Farms, Arizona. Redd had two bulk plants — one at Blanding and one at Kayenta, Arizona. (R. 431-432, 434) He distributed petroleum products purchased from Shell to other gasoline stations, including trade posts located at Tsegi, Shonto, Inscription House and Navajo Mountain, Arizona. (R. 444-45) He also served farm and industrial accounts in his territory. (R. 445-46) His largest volume customers were government accounts which primarily purchased diesel and burner fuel. (R. 446) Redd thus served inside his territory as both a wholesaler and retailer of petroleum products.

Shell "firmly and resolutely" enforced the explicit territorial resale restriction of Redd's jobber sales contract by its pricing and delivery practices. (R. 995-96) These practices were f.o.b. destination pricing and mandatory bulk plant delivery. (R. 833) Shell by the terms of its jobber contract only sold Redd gasoline and diesel fuel at prices f.o.b. his bulk plants and compelled delivery of the product Redd purchased from Shell to those bulk

plants before redistribution by Redd to his customers. (R. 833; PX. 2, Ex. 14, ¶¶ 2, 4, R. 782) Under these practices Abajo was required to purchase gasoline and diesel fuel from Shell at prices that included the cost of transporting such product to Abajo's bulk plants at Blanding and Kayenta and Abajo was required to accept delivery of such product at those plants located well inside Abajo's assigned territory and at substantial distances from the Ciniza refinery. (R. 841-43, 1070-71, 1074-75) Even Shell's own witnesses acknowledged that by purchasing product priced and delivered in this manner Redd was placed at a substantial competitive disadvantage in competing for business outside of his assigned territory. (R. 839, 840, 997)

Throughout the time Redd was a Shell jobber, Shell refused Redd's request to purchase product f.o.b. the Ciniza refinery, to haul his own product or to at least pay for and control the common carrier Shell used to deliver product to Redd's bulk plants. (R. 455-58, 479-80, 751-52; PX. 27, Ex. 119, R. 1120; DX. 1010, Ex. 224, R. 1160) Shell did not sell Redd product at prices f.o.b. refinery even though such pricing was common in the industry (R. 503-04, 1029) and Shell itself sold products to its unbranded jobbers at f.o.b. Ciniza prices. (R. 834-35) Shell also refused Redd's request for a hauling allowance under Shell's hauling allowance program. (R. 480) An f.o.b. destination price less the hauling allowance would, of course, equate to an f.o.b refinery price (R. 873, 997) and would give Redd control over his product at a price and a place that would permit him to effectively compete for business outside of his assigned territory. Under Shell's hauling allowance program, Shell still imposed mandatory bulk plant delivery, even when that requirement meant that a jobber had to drive right past a customer capable of accepting transport load delivery, incur the make-work cost of unloading and reloading the product from his bulk

plant and then backhauling the product to the same customers. (R. 867-68, 861-62) Jobbers, however, controlling product under a hauling allowance did not accede to the economic nonsense of mandatory bulk plant delivery and delivered bulk directly to customers from the refinery whenever and wherever it was in their competitive interest to do so. Shell simply refused to grant Redd's request for a hauling allowance. (R. 456-58, 479-80, 751-52, 1620-21) The reason Shell did not grant Redd's request was that Shell's management did not want Redd to haul his own product as an internal Shell document reflected when it stated, "As you know, Redd wants to buy a tanker and haul his own stuff. . . . I know region discourages any additional jobber doing their own hauling." (R. 1203-06) And in another Shell document which provided in writing concerning Redd, "Management frowns on jobbers hauling their own products and wants all requests discouraged." (PX. 22, Ex. 89, R. 869-70)

Throughout the time Redd was a Shell jobber, Shell delivered product to Redd by common carrier and paid the standard common carrier tariff. (R. 452, 842, 1125-26; PX. 13, Ex. 27, R. 755-56) Shell not only refused to sell product to Redd at f.o.b. refinery price or grant him a hauling allowance, Shell even refused to permit Redd to pay for and thus control the common carrier Shell used to haul product from the Ciniza refinery. (R. 457-58) Prior to 1970 Shell, at least, permitted its common carrier to deliver product directly to Redd's customers within his territory that were capable of accepting direct transport load delivery such as Redd's stations at Many Farms and Monticello and his large government accounts at Tuba City, Rocky Ridge, Rock Point, Rough Rock and Chilchinbito. (R. 1069-75, 843-44) When direct deliveries cost Shell less than bulk plant deliveries, Shell received the benefit of the short-stop deliveries by paying lower com-

mon carrier rates and charging Redd the same destination price. (R. 473, 475, 842-44, 1070) If there were additional charges, Redd paid them. (R. 474; Px. 50, Ex. 170-76, R. 1636) In January 1970, when Redd persisted in his requests to haul his own product or control the distribution of his product from the refinery by paying the common carrier, Shell not only refused this request, it required the common carriers to make deliveries only to Redd's bulk plants. (R. 842-44, 1069-75, 1078; PX. 13, Ex. 27-28, R. 755-56) After January 1970, for example in the case of Redd's stations at Many Farms, Shell required its common carriers to drive right through Many Farms on the way to Kayenta, unload the product in Redd's Kayenta bulk plant and then reload the product and backhaul it to Many Farms. (R. 477-78, 1126-27)

Such costly make-work methods of distribution were not only contrary to Redd's economic interest, they were contrary to Shell's legitimate economic interest. Accordingly, a highly experienced marketer of refined petroleum products in the Inter-Mountain west testified that the pricing and delivery practices Shell imposed upon Redd had the purpose and effect of controlling the territory in which Redd could resell products purchased from Shell. (R. 852-55, 865-68)

C. Statement of uncontroverted facts on Redd's claim of illegal tying. The franchise provision of Shell's standard jobber sales contract granted Redd a franchise to market under Shell's marketing identification — its trademarks, brand names and color scheme — on the condition Redd purchase all of the refined petroleum products including gasoline he marketed under such identification from Shell. Specifically, the franchise provision provided:

> "FRANCHISE: During the continuation of this contract, buyer shall have the right to sell, under Shell's trademarks, brand names and color scheme, the product purchased hereunder, . . . but Shell reserves for itself the right to sell its products under its trademarks, brand names and color scheme within buyer's territory, and for itself and all other authorized by it, the right to so sell such products outside of buyer's territory. Buyers shall not sell, under Shell's trademarks, brand names or color scheme any product other than the products purchased hereunder. . . ." (PX. 2, Ex. 1, ¶6, R. 438; Px. 14, Ex. 29, R. 782)

Shell supported market acceptance of its identification with extensive advertising to the tune of approximately $15,000,000 per year.

The Shell contract anticipated in accordance with normal industry practice that the jobber would use the franchise granted, and all during the time Redd was a Shell jobber all of his marketing facilities bore Shell's marketing identification. (R. 446-48, 1639-40, 2083) His service stations were painted with Shell's colors, flew the Shell flag in the form of large illuminated Shell clam signs, and all of his gas pumps were identified with Shell decals. In short, these stations looked like any typical Shell station. (R. 2084) His bulk plant and delivery trucks were also painted with Shell's colors and carried the Shell logo. (R. 1040)

Once Redd used Shell's identification, the franchise provision of Shell's contract totally foreclosed Redd from purchasing on a competitive basis any of the refined petroleum products he marketed. Redd could not purchase any of the gasoline he marketed from any source except Shell, even when the gasoline was Shell gasoline. (R. 1065-67, 884) Redd could not purchase gasoline from Conoco, even though Shell sold Conoco the same gasoline

at Ciniza Shell sold to Redd. (PX. 24, Ex. 94, ¶7, R. 1061-62; PX. 25, Ex. 104, ¶4, R. 1061-62) Redd could not purchase gasoline from American, even though Shell supplied American gasoline to Hunt, the Shell branded jobber immediately north of Redd. (R. 2133; PX. 16, Ex. 39, R. 788) He could not purchase gasoline from the Black Oil Company, a competing jobber, even though the gasoline was available at a cheaper price, (R. 513) and even though the gasoline Black Oil marketed was the same gasoline Shell sold Redd. (DX. 24, Ex. 93, R. 1061-62; DX. 25, Ex. 103, R. 1061-62) He could not purchase gasoline from Hunt, even though Hunt was a Shell jobber, because when he did that, Shell sued him. Finally, Redd could not purchase gasoline from a source other than Shell by specification, (R. 1066-68) even though Shell acquired gasoline that it required its jobber to purchase from Shell from non-Shell sources by specification. (PX. 16, Ex. 39, R. 788, R. 319M) Those facts were uncontroverted. (R. 884, 1065-67, 2133; PX. 16, Ex. 39, R. 788; PX. 24, Ex. 93, R. 1061-62; PX. 25, Ex. 103, R. 1061-62)

Shell suffered no such restriction. Shell supplied Hunt, a branded Shell jobber operating under the same franchise provision as Redd, with gasoline which Shell in turn acquired from American, and American manufactured at its Salt Lake refinery. (R. 2133) American did not manufacture special gasoline for Shell. American did not even manufacture gasoline according to Shell's specification. American furnished gasoline to Shell made to American specification. (PX. 16, Ex. 43, R. 788) American's exchange agreement with Shell thus provided, "In essence, products delivered shall conform in the delivering parties normal quality. Specifications for each product covering the respective delivery areas will be exchanged." (PX. 16, Ex. 43, R. 788) The octane rating of the gasoline American supplied Shell was so low the American-Shell

pricing schedule had to be revised. (PX. 16, Ex. 51, R. 788) Those facts were uncontroverted.

Shell sold Shell gasoline in large quantities separately from the right to use Shell's marketing identification .Thus, Shell sold Conoco the identical gasoline from its Ciniza refinery it sold Redd without the Shell identification and at substantially cheaper prices. (PX. 25, Ex. 104, ¶4, R. 1061-62; PX. 24, Ex. 94, ¶7, R. 1061-62) Shell also sold gasoline to its unbranded jobbers from Ciniza that had the same manufacturing characteristic as the gasoline it sold Redd. (R. 834-83; Naughton Depo. at 19-23) Finally, Shell marketed its franchise to Hunt separately from Shell refined gasoline when it required Hunt to purchase American gasoline from Shell. (Hunt Depo. R. 2133) Those facts were uncontroverted.

Shell supplied large quantities of refined petroleum products, including gasoline, pursuant to the franchise provision of Shell's standard jobbers contract. Redd alone purchased over three million ($3,000,000) in products from Shell (R. 538-539) and well over five hundred thousand dollars ($500,000) worth of gasoline. (DX. T-X, Ex. 210-14, R. 940; Gallagher Depo. Ex. 3) Those facts were uncontroverted.

Shell went to great lengths to determine whether gasoline purchased from sources other than Shell was being marketed under the Shell brand. It trespassed on its jobber's property to engage in secret meter readings. (R. 1641-42) Shell even went so far as to steal documents from Shell's jobbers to determine whether the jobbers were adhering to the compulsory purchase provision of the franchise. (PX. 52, Ex. 179-81, R. 1642)

The compulsory purchase of the gasoline Redd marketed under the Shell identification had the normal consequence of a tying arrangement. It foreclosed compe-

BLEED THROUGH

tition and resulted in Redd having to pay Shell a higher price for gasoline than the price of gasoline marketed on a competitive basis. Thus, in June of 1970, when Shell was selling Redd gasoline at sixteen and three-quarter cents (16¾¢) per gallon, (PX. 26, Ex. 114, R. 1084; R. 1105) it was selling a large coal company in Redd's territory the same gasoline at eleven and a quarter cents (11¼¢) — five cents (5¢) less per gallon and Shell's price to the national account by Shell's own admission was profitable. (PX. 27, Ex. 122, R. 1120)

Shell did not attempt to justify its tying arrangement with Shell jobbers on the ground of the need to maintain quality control. It did not plead any such justification as an affirmative defense, (R. 112-17) and indeed in its answers to Plaintiff's interrogatories, took the position that it did not claim in this case that there was any difference between Shell and non-Shell gasoline.[2] (PX. 15, Ex. 37-38, R. 785-86) Finally, any such attempted justification was conclusively negated by the fact that Shell itself purchased by specification.

D. OPINIONS BELOW

The Tenth Circuit reversed judgment for Redd pursuant to its holding on two fundamental antitrust issues. On Redd's claim of territorial resale restriction, the Circuit reversed and remanded to a new trial on the ground that the explicit territorial resale restriction of Shell's

---

[2] *Interrogatory 5,* State with regard to each delivery of (1) regular and (2) premium grade gasoline by Shell to the plaintiff:

* * *
* * *

(c) Each physical, chemical, or other characteristic of such gasoline that you claim distinguishes such gasoline from any other gasoline having the same research and motor octane as your gasoline.

Further Answer to Interrogatory 5:

(c) Shell does not make any claim in this case concerning any difference between the physical, chemical or other characteristics Shell gasoline and any other gasoline delivered to plaintiff or third persons. . . .

jobber contract enforced by the termination provision of that contract "standing alone does not create a *per se* violation of the Sherman Act . . . there must be a 'firm and resolute' action by the seller to enforce such limitations." (A-6) On Redd's claim of illegal tying, the Court reversed and held as a matter of law that there was no tying arrangement on the ground the franchise to use Shell's marketing identification was inseparable from refined petroleum products Shell compelled its jobbers to purchase from Shell. (A-3 - A-4) The Circuit further held that Shell could sue Redd for what Redd did, that is selling foreign gasoline under the Shell identification and reinstated Shell's counterclaim. (A-6 - A-7)

REASONS FOR GRANTING THE WRIT

A. The circuit court's decision squarely conflicts with this Court's decision in *U.S. v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). The circuit court's holding that explicit agreements between a manufacturer and each of its jobbers to restrict the territory in which such jobbers can resell the products purchased from manufacturers is not a *per se* violation of Section 1 of the Sherman Act absent "firm and resolute" action by the manufacturer to enforce the restriction squarely conflicts with this Court's decision in *Schwinn*. In *Schwinn*, this Court held:

> Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. . . Such restraints are so obviously destructive of competition that their mere existence is enough. (388 U.S. at 379)

Contrary to *Schwinn*, under the circuit's decision an explicit territorial resale restriction is not enough. "Firm

BLEED THROU

and resolute'' action enforcing the restriction becomes an essential element of the *per se* violation.

Nothing is more destructive of private antitrust enforcement than a circuit's disregard of a clear holding of this Court establishing the *per se* parameters of the Sherman Act. This Court itself has pointed out that ''without the per se rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act.'' *U.S. v. Topco Assoc., Inc.*, 405 U.S. 596, 609 n.10 (1972).

The decision below not only erodes the predictability of the *per se* rule of *Schwinn*, it is fundamentally inconsistent with the rationale of that decision. This Court in *Schwinn* determined that franchising would not become a general exception to the comprehensive policy of competition reflected in the Sherman Act. This Court in that case categorically rejected restrictions as to where and to whom a jobber or retailer can resell goods purchased from his supplier, as inconsistent with competitive freedom of independent businessmen guaranteed by the Act. An agreement between Shell and each of its branded jobbers restricting the territory in which each jobber can resell products purchased from Shell patently suppresses intrabrand competition among Shell and its jobbers. Such territorial restrictions are destructive of intrabrand competition regardless of whether such restrictions are enforced by the manufacturer or acquiesced in by the jobbers. Even if each jobber perceived that acquiescence in an explicit territorial restriction was in the jobber's interest and no ''firm and resolute'' action by the supplier to enforce the restriction was necessary, the public interest in the benefits of competition reflected in the prohibitions of the Sherman Act would still be thwarted. What difference does coercive conduct by the supplier make to the pur-

pose of the vertical *per se* prohibitions of Section 1 of the Sherman Act? Vertical resale restrictions whether as to territory or price are fundamentally pernicious to competition because they are agreed upon. The suppression of intrabrand competition is complete, regardless of whether Shell's jobbers acquiesce in the restriction or such restrictions are actively enforced by Shell.

A rule, moreover, of requiring "firm and resolute" enforcement as an essential element of a *per se* vertical violation undermines the effectiveness of the *per se* prohibition. The greater the disparity between the economic power of the manufacturer and its wholesalers and retailers, the less likely it is that the manufacturer will have to resort to "firm and resolute" action to enforce anticompetitive restrictions. Strong suppliers, such as Shell, may well be able to compel compliance with clear anticompetitive restraints through the economic power inherent in their relationship with their jobbers without the need to resort to overt action. That very risk was the foundation of this Court's decision in *FTC v. Texaco, Inc.*, 393 U.S. 223 (1968). The "firm and resolute" limitation on the *per se* rule of *Schwinn* opens the door for the evasion of that rule by the most powerful members of the economy. Judge Murrah made the point in his dissent from the Tenth Circuit's adoption of the "firm and resolute" requirement: "I do not believe that the legality of a contract such as this one should be made to turn on whether the contractual restrictions are 'firmly and resolutely' enforced. Otherwise, *Schwinn* is a shambles." *Colorado Pump and Supply Co. v. Febco, Inc.*, 472 F.2d 637, 642 (10th Cir.), *cert. denied*, 411 U.S. 987 (1973) (*Febco* did not involve explicit territorial resale restriction.)

B. The Tenth Circuit's "firm and resolute" limitation on Schwinn conflicts with the decisions of the Ninth and Fifth Circuits. Judge Murrah's view is the prevailing view in the Ninth and Fifth Circuits. Within two weeks of the Tenth Circuit's decision below, the Ninth Circuit, in reversing a lower court's refusal to apply the *per se* rule of *Schwinn*, read *Schwinn* to mean what it said. *Noble v. McClatchy Newspapers*, ... F.2d ...., [1975-2 Trade Cas. ¶ 60,594] (9th Cir. Nov. 14, 1975) In *Noble* the Ninth Circuit followed the literal *per se* rule of *Schwinn* and held:

> As we read the *Schwinn* opinion, manufacturer may avoid the per se rule only by vertical integration or adoption of agency or consignment methods of distribution. Manufacturers who wish to enjoy the advantages of distribution through independent entrepreneurs must be prepared to accept the burden of *Schwinn*. (1975-2 Trade Cas. at page 67,634)

The Ninth Circuit not only followed the *per se* rule of *Schwinn*, it supported the adoption of that prohibition. *Noble*, in turn, followed the Fifth Circuit's decision in *Copper Liquor, Inc. v. The Adolph Coors Company*, 506 F.2d 934 (5th Cir. 1975). Judge Wisdom, in a thoughtful analysis, examined and rejected policy arguments some commentators have directed against *Schwinn*. The Fifth Circuit concluded, as the Ninth Circuit has, that *Schwinn* laid down an unqualified prohibition against territorial resale restrictions and expressly considered and rejected the Tenth Circuit's "firm and resolute" limitation on the *Schwinn* doctrine. (*Id.* at 940-44)

In an economy in which nationwide distribution is commonplace, businessmen and litigants are entitled to know whether the Ninth and the Fifth Circuits' adherence to the *per se* rule of *Schwinn* or the Tenth Circuit's "firm and resolute" limitation on that doctrine are the law of

the land. The *per se* rule of *Schwinn* as this Court indicated in *U.S. v. Topco Assoc., Inc.*, 405 U.S. 596 (1972), was only adopted by the Court after careful consideration and precedential evolution. (*See also, White Motor Co. v. U.S.*, 372 U.S. 253 (1963) The rule, as the thoughtful opinions of the Ninth and Fifth Circuits demonstrate, has withstood the test of time and critical analysis. If the *per se* rule of *Schwinn* against customer and territorial resale restrictions is now to be limited or modified, it should be done by this Court. Even assuming arguendo, some limitation or modification is warranted, any such limitation or modification must reflect a balancing of legitmate competitive interests germane to the fundamental policy of the Sherman Act. The "firm and resolute" limitation of the Tenth Circuit reflects no such considerations. It merely opens an opportunity for evasion of fundamental policy by a debilitating graft upon the *Schwinn* doctrine.

C. The decision of the Tenth Circuit conflicts with the decisions of every other circuit that has passed on the question of whether a trademark license is a "separate" item for tying purposes. Tying arrangements have been consistently condemned by this Court under both the Sherman and Clayton Acts, for as Justice Frankfurter said, such arrangements "serve hardly any purpose beyond the suppression of competition," *Standard Oil Co. v. U.S.*, 337 U.S. 293, 305-06 (1949). This Court has held that there are three basic elements necessary to establish the *per se* illegality of tying arrangements under Section 1 of the Sherman Act: (1) "Separability" of tying and tied items; (2) "sufficient economic power" in the tying product; and (3) a "not insubstantial amount" of commerce, *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495 (1969); *Northern Pacific Railway Co. v. U.S.*, 356 U.S. 1 (1958); *International Salt Co., Inc. v. U.S.*, 332

U.S. 392 (1947); *International Business Machines Corp. v. U.S.*, 298 U.S. 131 (1936). There is no question that Shell granted Redd and other Shell jobbers under the franchise provision of its standard jobber sales contract the right to use Shell's marketing identification — its trademark, brand names and color scheme — on the condition that all of the refined petroleum products, including gasoline, marketed by such jobbers under Shell's marketing identification be purchased exclusively from Shell. (PX. 2, Ex. 2, R. 438) The threshold question, therefore, as this Court noted in *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495 (1969), was "the problem of determining whether two separate products are in fact involved." (394 U.S. at 507)

The Tenth Circuit disposed of that issue as a matter of law and held Shell's marketing identification "inseparable" from the refined petroleum products Shell required Redd and other branded jobbers to purchase from Shell. (A-4) The Circuit's decision directly conflicts with every other circuit that has passed on that issue. The Ninth, Fifth and Second Circuits have all held a trademark license in the form of a marketing franchise is a separate item for tying purposes from the products marketed under the franchise, *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); *Warriner Hermetics, Inc. v. Copeland Refrigeration Corp.*, 463 F.2d 1002 (5th Cir.), *cert. denied*, 409 U.S. 1086 (1972); *Susser v. Carvel Corp.*, 332 F.2d 505 (2d Cir. 1964), *cert. dism'd*, 381 U.S. 125 (1965), and have resolved that question diametrically against the decision of the Tenth Circuit as a matter of law. The position of these circuits has been consistently followed in the trial courts and by the Federal Trade Commission. *Detroit City Dairy, Inc. v. Kowalski Sausage Co., Inc.*, 393 F. Supp. 453 (E. D. Mich. 1975); *Ungar v. Dunkin' Donuts of America*,

Inc., 1975 Trade Cas. ¶ 60,204 (E. D. Pa. 1975); *Hawkins v. Holiday Inns, Inc.*, 1975 Trade Cas. ¶ 60,153 (W. D. Tenn. 1975); *Falls Church Bratwursthaus, Inc. v. Bratwursthaus Mgmt. Corp.*, 354 F.Supp. 1237 (E. D. Va. 1973); *FTC v. Phillips Petroleum Co.*, 3 Trade Reg. Rep. ¶ 20,716 (December 27, 1974) (FTC cease and desist order). Their doctrine has been applied from trademarks representing food items to trademarks representing parts and rebuilt compressors, *Chicken Delight, Warriner.* The rationale of these decisions, ably articulated by the Ninth Circuit in *Chicken Delight,* is premised on the recognition that trademarks under the Lanham Act are no longer a representation of product source but product quality.[3] Trademark licensing is therefore permissible and in the form of modern franchising has become very big business indeed. Franchising accounts for ten (10) per cent of the gross national product and at least twenty-five (25) per cent of all retail sales. At least 400,000 businessmen are franchisees and 70 to 90 billion dollars worth of goods are sold through franchised outlets, McCarthy, *Trademarks Franchising and Antitrust, The Trouble with Tie-ins,* 50 Calif. L. Rev. 1085, 1086 (1970); FTC, STAFF REPORT ON LEGAL PROBLEMS IN CONNECTION WITH FRANCHISE AGREEMENTS (1969). A trademark license, however, cannot be used by the owner of the mark to monopolize the supply of products to the owner's franchisees, for the legislative history of the Lanham Act makes clear and this Court long ago held a trademark may not be used as a device to evade the prohibitions of the antitrust laws, *Timken Roller Bearing Co. v. U.S.*, 341 U.S. 593 (1951); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied,* 405 U.S. 955 (1972); McCarthy, *supra.*

---

[3]Under the early source theory of trademark protection licensing was viewed as theoretically impossible since licensing meant the mark was being used by persons not associated with the actual manufacture of the product. *MacMahan Pharmacal Co. v. Denver Chemical Mfg. Co.*, 113 F. 468 (8th Cir. 1901).

The circuit found these precedents inapplicable and their rationale unpersuasive. It said of *Chicken Delight*, "Also we do not necessarily agree with its analysis of the problem." (A-4) The circuit held, contrary to the record, that Shell's franchise agreement with its branded jobbers was nothing more than a permissive trademark license to sell Shell gasoline as Shell gasoline. It found Shell's marks were designed for the sale of liquid product in bulk and were therefore analogous to the sale of a product in "one marked package." (A-4)

The circuit's analysis was an exercise in economic fantasy. The anti-competitive consequence of Shell's franchising arrangement with its jobbers was that the jobbers could not sell Shell gasoline as Shell gasoline. They could not purchase Shell gasoline from other Shell jobbers. They could not purchase Shell gasoline from Conoco, even though Shell sold Conoco the identical gasoline that it compelled its jobbers to purchase from Shell. Redd could not purchase gasoline from competing jobbers, even though that gasoline was available at lower prices and even though that gasoline was again the identical gasoline Shell sold Redd. (R. 1065-67, 884, 2133; PX. 16, Ex. 39, R. 788; PX. 24, Ex. 93, R. 1061-62; PX. 25, Ex. 103, R. 1061-62; Redd Depo. at 44-46) Under the franchise agreement, Shell jobbers could not purchase gasoline from American, even though Shell purchased gasoline from American pursuant to exchange agreements and marketed it under the Shell brand. (PX. 2, Ex. 3, ¶ 6, R. 438; PX. 18, Ex. 75, 77, 81, 85, R. 813) Finally, Shell jobbers could not purchase gasoline by specification (R. 1066-68), even though Shell purchased gasoline from American by specification and indeed purchased gasoline not by Shell specification, but by American specification. (PX. 16, Ex. 39, R. 788; R. 319M)

Certainly, Shell's franchise arrangement with its branded jobbers did not merely provide for the sale of "one marked package." Shell's branded jobbers having identified their stations and distribution facilities with Shell's marketing identification were not required to purchase a gallon, a barrel, or a transport load of gasoline or diesel fuel from Shell, they were required to purchase the total supply of those products they marketed under the Shell identification from Shell alone and not from any other source.

No trademark license is required to sell Ford cars as Ford cars, Browning shotguns as Browning shotguns, or Ivory soap as Ivory soap. It is a far different matter when the manufacturer's relationship with its dealers grants the dealer the right to utilize the manufacturer's marketing identification but compels the identifying dealer as a condition of such use to purchase all of the products marketed under such identification from the manufacturer. An agreement between Ford and its dealers authorizing them to use the Ford identification on the condition that all cars and parts marketed by such dealers under such identification be purchased from Ford ties the use of Ford's marketing identification to the purchase of cars and parts and forecloses competition for the supply of those products.

The circuit court also predicated its holding of nonseparability on the fact that Shell did not market its marketing identification separately from its refined petroleum products. (A-4) Certainly, that was not the case with regard to Shell's sale of American gasoline under the Shell brand. In that case, Shell was doing nothing more than selling the Shell identification to its jobbers and requiring them to purchase American gasoline from Shell. More importantly, as *Chicken Delight* squarely

holds, it is not a question of whether the trademark license is marketed separately by the owner of the mark. It is a question of whether the products associated with the mark are marketed separately by the industry or the owner. (448 F.2d at 48) In this case, Shell at the very refinery from which it supplied Redd had a contract with Continental Oil Company under which Shell supplied Continental Oil Company substantial quantities, 1700 barrels per day, of the identical gasoline it sold to Redd on a non-Shell identified basis and at substantially lower prices. (PX. 24, Ex. 93, R. 1061-62) Shell also sold substantial quantities of gasoline with the same manufacturing characteristics on a non-Shell identified basis to unbranded jobbers. (R. 834-83; Naughton Depo. at 19-23) The authorities make clear that that is the test of separability — whether the items have been or can be sold separately, *U.S. v. Jerrold Electronics Corp.*, 187 F.Supp. 545 (E. D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961); *Siegel v. Chicken Delight, Inc., supra; Kugler v. AAMCO Automatic Transmissions, Inc.*, 337 F. Supp. 872 (D. Minn. 1971), *aff'd*, 460 F.2d 1214 (8th Cir. 1972). Indeed, the most effective use of the economic power of a tying item may be to offer it for sale only on a tying basis, *see International Salt Co., Inc. v. U.S.*, 332 U.S. 392 (1947).

The circuit court further found the right to use Shell's marketing identification was not a "franchise" irrespective of the fact that the Shell jobber sales contract designated Shell's license of its branded jobbers to use such identification as a "FRANCHISE." (A-3) The economic facts were, of course, Redd, as other Shell jobbers, utilized Shell's marketing identification in his business as a marketing franchise and he identified his stations, including a station he leased from Shell, as Shell stations. He also identified his bulk plants and trucks with Shell's marketing identification. (R. 446-48, 1639-41) The ques-

tion for antitrust purposes is not whether all franchises are the same, but whether a trademark license in the form of a marketing franchise or merely a license to use the marketing identification, including the trademarks, of a supplier grants the supplier a monopoly to control the supply of products to the licensee. More specifically, in the case of Shell the question is whether a trademark license in the form of a marketing franchise or a license to use Shell's marketing identification grants Shell a monopoly to control the supply of refined petroleum products marketed by Shell's jobbers under Shell's identification when Shell sells those products separately from its marketing identification and purchases those products for sale under its identification by specification.

The consequences of the arrangement, regardless of whether it is denominated a "franchise," are precisely the consequences against which the tying prohibitions of the Sherman and Clayton Acts are aimed. Through its arrangement with Shell jobbers, Shell, at the least, totally deprives them of any opportunity to purchase refined petroleum products, including gasoline, marketed under the Shell identification on a competitive basis. Correspondingly, competitors of Shell are foreclosed from supplying products marketed on that basis. As a practical matter, Shell, through its arrangement with its jobbers, totally controls the supply of products to such jobbers and forecloses all competition in supply.

The issue raised is not whether the arrangement is necessary to control the quality of product marketed under Shell's identification, but whether in order to insure the quality of the product marketed under Shell's identification Shell must control the supply of that product. The question of quality control would only be raised if Shell attempted to justify what obviously is in fact a tying

arrangement with its jobbers. Such justification was never attempted by Shell. (PX. 15, Ex. 37, R. 785-86) It was never pled. (R. 112-17) It was never proved, and indeed it was conclusively negated by the fact that Shell purchased by specification, *U.S. v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E. D. Pa, 1960), *aff'd per curiam*, 365 U.S. 567 (1961); *Standard Oil Co. v. U.S.*, 337 U.S. 293 (1949); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

D. The question of whether major oil companies can use trademark licenses to control the supply of gasoline and other refined petroleum products to their branded jobbers and dealers conflicts with the rationale of this Court's decision in *Timken Roller Bearing Co. v. U.S.*, 341 U.S. 593 (1951) and is of substantial importance to the petroleum industry and to the nation. Twenty-five years ago this Court, in *Timken* stated, "A trademark cannot be legally used as a device for Sherman Act violation." (*Id.* at 599) The Court made this statement in the context of rejecting a justification of an international cartel on the ground that it was reasonably necessary to implement a valid trademark licensing system. The decision of the trial court affirmed by the Supreme Court in *Timken* even spoke more comprehensively of the problem and of the clear intent of Congress to make the Lanham Act subservient to the comprehensive policy of competition reflected in the antitrust laws. The trial court said:

> The trade mark may become a detrimental weapon if it used to serve a harmful or injurious purpose. If it becomes a tool to circumvent free enterprise and unbridled competition, public policy dictates that the rights enjoyed by its ownership be kept within their proper bounds. If a trade mark may be the legal basis for allocating world markets, fixing of prices, restricting competition,

> the unfailing device has been found to destroy every vestige of inhibition set up by the Sherman Act. The rights pertaining to trade marks and trade names were well known long before that legislative enactment was passed by Congress. *It is certain that it was never intended that the consequences of violations of the antitrust laws may be escaped by the licensing of trade marks.*

Timken Roller Bearing Co. v. U.S., 83 F. Supp. 284, 316 (N. D. Ohio 1949) (Emphasis supplied). The decision of the Tenth Circuit simply cannot be squared with the rationale of *Timken.*

The use by major oil companies of trademark licenses to control the supply of refined petroleum products to their branded jobbers and dealers severely curtails competition in supply in what is perhaps the nation's most important industry. Under the Tenth Circuit's decision below, every major oil company can control the supply of refined petroleum products to its branded jobbers and dealers through trademark licensing, even though the major oil companies extensively exchange refined petroleum products among themselves for sale on a branded basis by specification. FTC, STAFF REPORT ON THE PETROLEUM INDUSTRY, ch. IV (1973). Branded jobbers and dealers under the trademark licensing arrangement sanctioned by the Tenth Circuit are deprived of the competitive opportunity enjoyed by major oil companies, that is to purchase the products they market on a branded basis by specification. Correspondingly, independent refiners and marketers are foreclosed from competing with major oil companies and major oil companies with each other in the supply of gasoline and other refined petroleum products to branded dealers and jobbers.

The suppression of competition is aggravated by the structure of the industry. In 1970, eight (8) major oil

companies accounted for fifty-eight (58) per cent of the domestic refining capacity of the United States and fifteen (15) major oil companies accounted for over eighty (80) per cent of that capacity. The top eight (8) refiners were also the top eight (8) crude producers and the top eight (8) marketers of gasoline. Eight (8) companies in 1970 controlled fifty-five (55) percent of the gasoline marketed in the country, and fifteen (15) companies controlled over seventy-five (75) per cent. (FTC, STAFF REPORT at II-14, II-16, II-22, II-24)

Major oil company domination of refining and marketing not only demonstrates the extensive impact of the Tenth Circuit's decision, but raises the risk that adherence to that decision will result in even further concentration in the industry. If major oil companies can realize higher revenues on the sale of gasoline and other refined petroleum products by foreclosing competition in the supply of product marketed under their respective brands, in periods of short supply less and less of their refining capacity will come to market either on an unbranded basis or through independent marketers. Competition in the industry will be further curtailed and prices will continue to increase in a now altogether too familiar pattern.

Assuring competition in the supply of refined products marketed on a branded basis may indeed be the most effective way this country has of securing for the public any benefit from competition in this industry. The impact of OPEC upon the worldwide price of crude oil is common knowledge and apparently beyond the control of our national policy. Perhaps the last opportunity for the public to have demand impact on the price paid for refined petroleum products is by open competition in the supply of those products. Such demand in the major mar-

kets of the free world may even unleash backward competitive pressures in this highly integrated industry. This opportunity, however, will be lost if major oil companies can use trademark licenses as a device to monopolize the supply of refined petroleum products to their branded jobbers and dealers.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

By .....

DANIEL L. BERMAN
DOUGLAS J. PARRY
Counsel for Petitioner

January 29, 1976

CERTIFICATE OF SERVICE

I, DOUGLAS J. PARRY, Attorney for Petitioner, Keith B. Redd, d/b/a Abajo Petroleum, do hereby certify that on this .... day of January, 1976, a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit has been served on the following:

WILLIAM SIMON, Esq.
Howrey, Simon, Baker & Murchison
1761 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

MERLIN O. BAKER, Esq.
Ray, Quinney & Nebeker
400 Deseret Building
Salt Lake City, Utah 84111

Attorney of Record for the Respondent, by mailing the same to them through the United States Mail, postage prepaid.